Chapter 3

Procedural Protections

3-1. Purpose and Scope

As noted,[1] the SCRA is divided into seven titles. Title II is called "General Relief." It may be broken down into procedural and substantive protections or benefits. This chapter will consider the SCRA's procedural protections as follows: the protection against default judgments, stays of civil and administrative proceedings, stays of judgments, and the tolling of civil statutes of limitations. The substantive Title II benefits capping interest on pre-service obligations[2] and other contractual protections are examined in Chapter 6.

3-2. Default Judgment Protection

The SCRA's default provision is markedly different from the prior legislation. Congress enhanced its explanation of the protection. In any event, it is examining out the statute in its entirety:

50 U.S.C. app. § 521

> (a) Applicability of section. This section applies to any civil action or proceeding in which the defendant does not make an appearance.
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> (b) Affidavit requirement.
>
> > (1) Plaintiff to file affidavit. In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit----
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> > > (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
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> > > (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
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> > (2) Appointment of attorney to represent defendant in military service. If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the

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[1] *See supra* para. 1-5.

[2] *See* 50 U.S.C.S. app. § 527 (LEXIS 2006).

servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit. If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act.

(4) Satisfaction of requirement for affidavit. The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

(c) Penalty for making or using false affidavit. A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(d) Stay of proceedings. In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that----

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

(e) Inapplicability of section 202 procedures. A stay of proceedings under subsection (d) shall not be controlled by procedures or requirements under section 202 [50 U.S.C. app. § 522].

(f) Section 202 protection. If a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding under section 202 [50 U.S.C. app. 522].

(g) Vacation or setting aside of default judgments.

(1) Authority for court to vacate or set aside judgment. If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that----

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) Time for filing application. An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.

(h) Protection of bona fide purchaser. If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment.[3]

3-3. Reopening Default Judgments

The requirements of the statute are triggered when a plaintiff moves for a default judgment. That being said, it is easier to understand the statutory requirements by beginning the examination from the tail end of the procedure. In other words, by examining how a servicemember reopens a default judgment. First, the defendant-servicemember must apply to the same court that rendered the original default judgment.[4] Since default judgments obtained in violation of the SCRA are merely voidable and not void,[5] "a judgment remain[s] valid until

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[3] *Id.* app. § 521.

[4] Davidson v. GFC, 295 F. Supp. 878 (N.D. Ga. 1968) (no basis for collateral attack and no federal question presented). *See supra* para. 2-6 nn. 57-60 and accompanying text.

[5] *See, e.g.*, United States v. Hampshire, 892 F. Supp. 1327 (D.Ks. 1995), *aff'd* 95 F.3d 999 (10th Cir. 1996); Krumme v. Krumme, 636 P.2d 814, 817 (1981). A void judgment would not necessitate SCRA analysis. For example, if a plaintiff took a default judgment absent service of process, then the judgment would be void. Saborit v. Wlech, 113 S.E.2d 921, 922 (1963).

properly attacked by a service man."[6] Next, the default judgment must have been rendered against the defendant servicemember during his/her period of active duty service[7] or within sixty days thereafter.[8] This excludes judgments rendered before the defendant entered military service or more than sixty days after separation from service. Additionally, the servicemember has ninety days from the end of the active service to file an application to reopen the default judgment.[9] Defendants discovering default judgments more than ninety days after termination of their military service are too late to invoke the SCRA.[10]

There are, however, three main criteria that must be met if a servicemember is to reopen a default judgment. The servicemember must not have made an appearance in the case.[11] The servicemember's military service must be shown to have materially affected his or her ability to defend the suit[12] and "the servicemember [must have] a meritorious or legal defense to the action or some part of it."[13]

a. Defendant must not have Appeared in the Case. The SCRA states that the default protection "applies to any civil action or proceeding in which the defendant does not make an appearance."[14] The question then becomes one of what constitutes an appearance. Under the

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[6] Ostrowski v. Pethick, 590 A.2d 1290, 1293 (1991). *See also* Collins v. Collins, 805 N.E.2d 410, 414 (Ind. Ct. App. 2004); *In re* the Paternity of T.M.Y. Kevin Nickels v. York, 725 N.E.2d, 997, 1004 (Ind. Ct. App. 2000).

[7] The SCRA definition of active duty comes from Title 10: "The term 'active duty' means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty." 10 U.S.C. § 101(d)(1) (2000). *See also supra* para. 2-2.

[8] 50 U.S.C. app. § 521(g)(1).

[9] *Id*. app. § 521(g)(2).

[10] *See, e.g.*, Morris Plan Bank v. Hadsall, 202 Ga. 52, 53, 41 S.E.2d 881, 882 (1947) (untimely); *Collins*, 805 N.E.2d at 414 (untimely); *Nickels*, 805 N.E.2d at 1004(untimely); Smith v. Davis, 364 S.E.2d 156, 158 (1998) (timely); Radich v. Bloomberg, 54 A.2d 247, *cert. denied*, 332 U.S. 810 (1947)(

[11] 50 U.S.C. app. § 521(a).

[12] *Id*. app. § 521(g)(1).

[13] *Id*. app. § 521(g)(2).

[14] *Id.* app. § 521(a).

former law, the statute spoke of "a default of any appearance"[15] and tended to mean any appearance whatsoever.

> Consideration of the meaning of the phrase "any appearance" is sometimes required. The 1918 Act used the words "an appearance" but in the 1940 Act the phrase was broadened to read "any appearance." The word "appearance" is defined in Webster's New Int. Dict. 2d Ed., 1940, as meaning in law, "the coming into court of a party summoned in an action either by himself or by his attorney." Technically there are several different kinds and methods of appearance. See Am Jur, appearances, section 1, etc. A default of any appearance by the defendant means a default in any one of several ways of making an appearance. "Any" applies to every individual part without distinction.[16]

Any act before the court by a defendant-servicemember, or the defendant's attorney, will constitute an appearance depriving the servicemember of the default protections. In fact, this can even include a request for a stay pursuant to the SCRA's stay provision.[17] In *Blankenship v. Blankenship*,[18] for instance, the defendant's counsel filed an affidavit asking the court to quash the complaint and the service or continue the cause under the SSCRA's stay provisions. Following the court's entry of judgment, the defendant servicemember filed for a rehearing.[19] Although he had been in Japan during the suit, the court denied a rehearing indicating that the motion to quash or continue constituted an appearance.[20] The court did not accept the argument that there was a worthy distinction between whether the appearance was "special" or "general" because the statute looked to cover "*any*" appearance.[21] As another example, the court in *Skates v. Stockton*,[22] held

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[15] *Id.* app. § 520(1) (2000).

[16] *In re* Cool's Estate, 18 A.2d at 716-17.

[17] *See* 50 U.S.C. app. § 522. *See infra* para. 3-5 (providing a discussion of this protection). In fact, the modern version of the law indicates that resort to the stay protections precludes later resort to the default provisions. *See* 50 U.S.C. app. § 522(e)("A servicemember who applies for a stay . . . and is unsuccessful may not seek the protections afforded by [50 U.S.C. app. § 521]").

[18] 82 So. 2d 335, 336 (1955).

[19] *Id*. 82 So.2d at 338-9.

[20] *Id*. at 340.

[21] *Id*. On this issue about what constitutes an appearance, *see also* Major Garth K. Chandler, *The Impact of a Request for a Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 169, 171-4 (1983).

that a letter to the trial court from a legal assistance attorney requesting a stay "constituted a general appearance whereby the appellant submitted to personal jurisdiction"[23] and thereby waived the servicemember's protections from suffering a default judgment.

Other courts, under similar facts, have ruled differently. In *O'Neill v. O'Neill*, the respondent servicemember's counsel filed motions to dismiss, under the state law, for lack of jurisdiction.[24] After those motions were denied, counsel sought a continuance under the SSCRA.[25] As one might guess, the respondent did not show for the trial. Despite these rather substantial efforts on the part of counsel, the Mississippi Supreme Court "[held] that [the servicemember's] motion for relief amounts to no more than an application to stay the proceedings and should not be construed as an appearance."[26] Similarly, a trial court had this to say about a letter from a legal assistance attorney to a clerk of court and opposing counsel explaining that the servicemember's ability to meet certain mortgage obligations had been prejudiced by the servicemember's military service:

> [H]is "legal" advisor was the legal assistance officer – a first lieutenant in the Air Corps – stationed at a camp in a distant State. Surely, it cannot be said that this defendant is represented by authorized counsel who could, if necessary, assert on his behalf the relief which might be obtained under the Federal or State Soldiers' and Sailors' Civil Relief Act.[27]

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[22] 683 P.2d 304 (1984).

[23] *Id*. at 306. *See also* Marriage of Lopez, 173 Cal. Rptr. 718, 721 (Cal. App. 1981) (letter to opposing counsel did not substitute for an actual appearance); Reynolds v. Reynolds, 134 P.2d 251 (1943) (attorneys entered appearance to contest jurisdiction);Artis-Wergin v. Artis-Wergin, N.W.2d 750 (Wis. Ct. App. 1989) (letter from legal assistance attorney).

[24] 515 So.2d 1208, 1210 (Miss. 1987).

[25] *Id*.

[26] *Id*. at 1212. *See also* Kramer v. Kramer, 668 S.W.2d 457 (Tex. Ct. App. 1984) (jurisdiction faulty for lack of minimal contacts, but servicemember's letter to court invoking SSCRA rights likewise did not constitute an appearance); Rutherford v. Bentz, 104 N.E.2d 343 (1952) (telegram to court did not amount to appearance); Vara v. Vara, 171 N.E.2d 384 (Com. Pleas Ct. 1961).

[27] Bowery Savings Bank v. Pellegrino, 185 Misc. 912, 914, 58 N.Y.S.2d 771, 773 (Sup. Ct. 1945). The facts in the case are not fully explained, but it seems apparent that the servicemember had hoped to avail himself of the former law's mortgage protection provisions. For the current provision, *see* 50 U.S.C. app. § 533 (LEXIS 2006).

The requirement for the court to appoint an attorney to represent a defaulting defendant-servicemember is discussed later in this chapter, but it should be noted at this point that the actions of the court-appointed attorney will not generally bind the servicemember.[28]

The new legislation respecting the right or opportunity for a servicemember to stay civil proceedings must be kept in mind. A request for a stay may amount to the entry of appearance, but the servicemember still has other options. In other words, while an appearance will preclude resort to the default protections, the picture is not completely bleak.[29]

b. The Servicemembers' Military Service must have Materially Affected Ability to Defend. The next significant criterion is that the servicemember's military duties materially affect, that is prejudice, his/her ability to defend the suit at the time the default judgment is entered.[30]

On this question of fact, the trial courts are given wide discretion.[31] Servicemembers must show that at the time of judgment they were prejudiced in their ability to defend the suit because of their service. The courts have ruled that a voidable default judgment is subject to being vacated at the instance of a servicemember, but only upon proper showing that the servicemember's defense has been prejudiced by reason of military service.[32] In *Becknell v. D'Angelo*,[33] the court vacated an amended divorce decree of a servicemember who had left the continental United States before a hearing on his wife's motion to amend, even though he had appeared at the hearing on the initial

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[28] 50 U.S.C. app. § 521(b)(2). *See also infra* para. 3-4b.

[29] *See generally* 50 U.S.C. app. § 521. *See also infra* para. 3-6.

[30] 50 U.S.C. app. § 521(g)(1).

[31] LaMar v. LaMar, 505 P.2d 566, 568 (1973); Krumme v. Krumme, 636 P.2d 814, 817 (1981); Ostrowski v. Pethick, 590 A.2d 1290, 1293 (1991)

[32] *See, e.g.*, Allen v. Allen, 182 P.2d 551, 553 (1947) (servicemember "unquestionably prejudiced by reason of his military service in making his defense"); Unsatisfied Claim & Judgment Fund Board v. Fortney, 285 A.2d 641, 645 (1971) ("an opportunity should be afforded to the defendant upon the remand to show whether he was prejudiced by reason of his military service and whether he in fact has a meritorious or legal defense to the action"); Smith v. Davis, 364 S.E.2d 156, 158 (1988) (prejudice found where servicemember "stationed in California assigned to a unit that at anytime could be sent to the western Pacific"); Cornell Leasing Corp. v. Hemmingway, 553 N.Y.S.2d 285 (N.Y. Civ. Ct. 1990) (no showing of prejudice where servicemember lived in vicinity of court and status as reserve or active soldier was unclear); Thompson v. Lowman, 155 N.E.2d 258, *aff'g* 155 N.E.2d 250 (1958).

[33] 506 S.W.2d 688 (Tex. Civ. App. 1974).

decree. His military service prejudiced his ability to defend in the action.[34] In *Federal Home Loan Mortgage Corp. v. Taylor*,[35] the court held the acceleration of the entire mortgage debt due to default on one month's installment was unconscionable. Gaps in payments were attributable, in large part, to the mortgagor husband's military service in the Philippines.[36] In *Hawkins v. Hawkins*, [37] a case involving paternity, child support, and the division of retirement pay, the court found ample prejudice where the servicemember was unable to take leave to defend the action.[38] In fact, the court remarked that "the inability to obtain leave from military service in order to conduct a proper defense is exactly the type of situation the act was created to address."[39] Finally, in cases where the servicemember is stationed overseas, it is possible for a court to find that the overseas service amounts to a prima facie showing of prejudice; that is, a finding that the military service has materially affected the servicemember's ability to defend the suit.[40]

As much as deployments, leave policies, and overseas assignments can clearly impact a servicemember, the opposite can also be true. In the bulk of litigation it is doubtful that military service creates any more of an impact than any other pursuit. How difficult is it, in most cases, for a servicemember to defend a suit in a state court near the installation? Like any other citizen, the servicemember may have to work through an attorney to schedule convenient dates, but the

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[34] *Id.*at 693.

[35] 318 So. 2d 203 (Fla. App. 1975).

[36] *Id.* The result may also have been attributable to the fact that the servicemember's child was sent back to a hospital in Texas. This necessitated that the servicemember's spouse reside in an apartment near the child's location. While the child's condition may not have had anything to do with the military service, the necessity of having to send her to a distant facility was because of the military service. *Id*. at 207.

[37] Hawkins v. Hawkins, 999 S.W.2d 171 (Tex. App. 1999).

[38] *Id.* at 175.

[39] *Id.*

[40] *See e.g.*, Saborit v. Welch, 133 S.E.2d 921 (1963); Murdock v. Murdock, 526 S.E.2d 241, 246 (S.C. App. 1999) ("For the clerk or the judge to fail to acknowledge that the husband was in the military and his reason for not appearing was because he was stationed in Japan is disconcerting"). *But see* LaMar v. LaMar, 505 P.2d 566 (1973) (no abuse of discretion to refuse to vacate default divorce judgment obtained against servicemember stationed abroad, where he was fully informed of action, took no steps to protect any rights he might have cared to assert, and made no attempt to stay proceedings).

military service will not have an adverse impact.[41] In sum, "[a] soldier . . . is not entitled to relief under the Soldiers' and Sailors' Civil Relief Act as a consequence of his membership in the armed services but, rather, because his defense is materially affected by his military service."[42] Further, the burden of proof is on the servicemember to prove this point.[43]

c. Servicemember Must Have a Meritorious Defense. Closely linked to the requirement that the servicemember's service must materially affect or prejudice his/her ability to defend the suit, is the requirement that the servicemember have a meritorious defense to the suit.[44] That is, at the time of the default judgment, the servicemember could not defend the suit because of military service, but if s/he had been able to, s/he would have been able to offer up a defense.

This is not to say that the servicemember must have a defense that would have prevailed. It is merely that the servicemember would have offered a cogent defense to the trier of fact had the matter actually gone to trial. In other words, "in a hearing under this section . . . the court does not decide the issue . . . it decide[s] only if there [is] an issue between the parties which would entitle the defendant to a trial."[45] To ultimately succeed on the merits, however, the service member must still have a meritorious defense.

Although the servicemember would not have to prove the case when moving to set aside the default judgment, "facts showing a meritorious defense should be pleaded."[46] In more concrete

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[41] Burgess v. Burgess, 234 N.Y.S.2d 87 (1962). In *Burgess*, the servicemember was stationed where "he was always accessible to the court" and he had been "fully informed of the pendency of the action." *Id*. at 89. Additionally, the day before the inquest, which ultimately resulted in a default judgment, the servicemember's attorney had called for the servicemember only to find that he was on leave. One can infer that it was his leave, rather than any requirement of the military, that prevented his attendance. *Id.*

[42] Wilson v. Butler, 584 So.2d 414, 416 (Miss. 1991) (citing Roberts v. Fuhr, 523 So.2d 20, 28 (Miss. 1987). Ironically, the defendant-soldier in *Wilson* was stationed at Fort Ord, California. Thus, there may have been evidence that would have supported a claim of material effect. The point, however, is that he did not present evidence to prove the point. *Id*.

[43] *Id*.

[44] 50 U.S.C.S. app. § 521(g)(1)(B) (LEXIS 2006).

[45] Kirby v. Holman, 25 N.W.2d 664, 675 (1947). In construing a similar Iowa rule, the court also stated that "[t]he requirement that the petition allege a meritorious defense does not require the allegation of a defense which can be guaranteed to prevail at a trial and there need be no evidence to establish the defense." *Id*. at 675.

[46] Thompson v. Lowman, 155 N.E.2d 258, 261 (1958).

terms, a defendant might assert that he was not the father in a paternity case[47] or that he was not receiving pay in a child support matter.[48] The servicemember might plead that he has "tender[ed] payment prior to foreclosure,"[49] but the servicemember will have to make more than a mere argument or claim to a meritorious defense.[50]

d. Protection of Bona Fide Purchaser. In the event a court sets aside a default judgment taken against a servicemember who is able to show prejudice and a meritorious defense, "that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment."[51]

3-4. Moving for a Default Judgment

Having considered the protection available when a servicemember seeks to set aside a default judgment, it must be noted that there are other requirements that must be followed at the time a party moves for default on the case or for default with respect to a particular aspect of the litigation. This section will outline those requirements and highlight their upshots.

First, the moving party must file an affidavit.[52] The affidavit must indicate whether the defendant is in the military service, not in the military service or whether the defendant's status cannot be determined. If the servicemember is absent, then the court must look to appoint an attorney for the absent servicemember.[53] Much litigation has revolved around affidavits indicating that the defendant is not in the military service, false affidavits, and the lack of an affidavit. These scenarios, along with the requirements for when the defendant's status is unknown, are discussed in Subsection a, below. The requirements and issues surrounding a defendant who is in the military service are taken up in Subsection b, below.

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[47] *See, e.g.*, Hawkins v. Hawkins, 999 S.W.2d 171, 176 (Tex. App. 1999) (mother of child, in answers to interrogatories, admitted to having sexual relations with other men and servicemember was outside state at probable time of conception).

[48] *See, e.g.*, Smith v. Davis, 364 S.E.2d 156 (1988).

[49] Flagg v. Sun Inv. & Loan Corp., 373 P.2d 226, 229 (Okla. 1962).

[50] Urbana College v. Conway, 502 N.E.2d 675, 678 (1985) ("allegations describe a counterclaim, rather than a defense"). *See also*; LaMar v. LaMar, 505 P.2d 566 (Ariz. App. 1973) ("motion to vacate must not only declare that movant has a good and meritorious defense to the action but must also set out what it is"); Martin v. Martin, 292 S.W.2d 9 (1956) (failure to show a meritorious defense).

[51] 50 U.S.C.S. app. § 521(h) (LEXIS 2006).

[52] *Id*. app. § 521(b)(1).

[53] *Id*. app. § 521(b)(2).

a. Affidavit. The Act provides that before judgment in any action in any court, if there is a default of any appearance by the defendant, the plaintiff must file an affidavit stating facts showing whether the defendant is in military service.

(1) When required. The Act is clear that this subsection applies to any civil action or proceeding in any court. There has been little controversy on this point, although courts have ruled that presentation of a will for probate was not an adversary proceeding and interested parties need not appear before the court. Therefore, the court did not require an affidavit by the plaintiff (petitioner) when the minor son of the deceased was in military service.[54] The court held that the former SSCRA applied only when servicemembers are sued as defendants. It did not apply to *in rem* and similar proceedings that were not against named defendants.[55] Nevertheless, the majority of decisions have included probate cases within the scope of this subsection.[56]

More precisely, the requirement for the plaintiff to file an affidavit kicks in when "the defendant does not make an appearance."[57] Courts have been known, however, to make a distinction between a preliminary declaration or notation of default and a judgment of default with the affidavit not being required until the court reaches the latter step.[58]

(2) Content. Again, there are three "choices" a plaintiff/moving party may make when filling out the affidavit: that the defendant is in the military service, that the defendant is not in the military service, or that the plaintiff does not know whether the defendant is in the military service.[59] If the affidavit alleges that the defendant is or is not in the military service, then it must go on and bring out "facts to support the affidavit."[60] There must be, that is, some explanation for

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[54]Case v. Case, 124 N.E.2d 856 (Ohio Probate Ct. 1955). *See also* McLaughlin v. McLaughlin, 46 A.2d 307 (1946). *But see* Lavender v. Gernhart, 92 A.2d 751 (1952) (indicates that "probate of a will in common form is not a judgment, action or proceeding," but a caveat, or issue concerning a will's validity is another matter and something to which the SCRA will apply).

[55] *Case*, 124 N.E.2d at 859.

[56] *See, e.g.*, *In re* Ehlke's Estate, 27 N.W.2d 754 (1947); *In re* Cool's Estate, 18 A.2d 714 (1941); *In re* Larson, 183 P.2d 688 (1947) (action to change child's surname), *overruled on other grounds by* Schiffman v. Schiffman, 620 P.2d 579 (1980); Steingrabe Estate, 1 Pa. D. & C.3d 164 (1976). *See also* State *ex rel*. Estate of Perry v. Roper, 168 S.W..3d 577 (Mo. Ct. App. 2005).

[57] 50 U.S.C. app. § 521(a).

[58] *See, e.g.*, Interinsurance Exchange of the Automobile Club of S. California v. Collins, 37 Cal. Rptr. 2d 126 (1994).

[59] 50 U.S.C. app. § 521(b)(1).

[60] *Id*. app. § 521(b)(1)(A).

how the affiant came to the conclusion.[61] To accomplish this, the plaintiff should consider the inquiry to be in the nature of "an investigation."[62]

Some trial courts have been quite clear about what they feel is acceptable. Consider the following description from a case involving "commercial nonpayment" and a number of respondents: [63]

> In the case at bar, petitioner's agent avers that on Tuesday, April 9, 2002, at 9:20 A.M., Wednesday, April 10, 2002, at about 1:00 P.M., and Thursday, April 11, 2002, at 4:35 P.M., he went to the premises at issue to inquire whether respondent was in the military or dependent on someone in the military, but the store was consistently closed . . .. He further avers that in January 2002, when respondent applied to lease the premises as a cellular phone store, he told the agent he was self--employed, and did not state that he was in the military or dependent on someone in the military. The agent never saw respondent in a military uniform . . . The affidavit does not state, however, whether respondent completed a written application which might contain more information such as his age, references, home address, banking references, alternative telephone numbers, or other means by which respondent might be reached. Indeed, there is no indication whether the written lease for this premises, as is often true in commercial cases, provides a secondary address for the respondent for the service of notices. Finally, the court notes that it is possible to obtain an individual's military status by contacting the military service directly. This apparently was not done.[64]

The court did not find these efforts sufficient.[65] It did grant the plaintiff an opportunity to revisit the matter with the filing of a new affidavit[66] and it gave the plaintiff guidance about what it expected to find in the subsequent affidavit:

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[61] *See* Toyota Motor Credit Corp. v. Montano (*In re* Montano), 192 B.R. 843,846 (D. Md. 1996) ("fail[ure] to reflect any facts underlying the declaration or any investigation undertaken before filing the statement"); United States v. Simmons, 508 F. Supp. 552 (E.D. Tenn. 1980) (affidavit in question "contains not the slightest hint as to . . . what fact(s) the affiant's stated . . . 'best information and belief' . . . were acquired"). *See also* Heritage East-West, LLC. v. Fairlough Kennedy Plaza, LLC., 785 N.Y.S.2d 317, 322 (N.Y. City Civ. Ct. 2004) (court became suspicious of affidavit where affiant "attested that she spoke to two persons at the *same time* on the *same date* and in some instances . . . to the same person at the same time about several Respondents"); Mill Rock Plaza Associates v. Lively, 580 N.Y.S.2d 815 (N.Y. City Civ. Ct. 1990).

[62] Citibank, N.A. v. McGarvey, 765 N.Y.S.2d 163, 168 (N.Y. City Civ. Ct. 2003).

[63] 21948, LLC v. Mohammand Riaz, 745 N.Y.S.2d 389, 390 (N.Y. City Civ. Ct. 2002).

[64] *Id*. at 390-1.

[65] *Id*. at 391.

> Proof of further investigation, including at least another visit to the premises during the business hours posted on the storefront, if any, or during customary business hours if no such hours are posted. In addition the movant shall annex a copy of any written lease or rental application, as well as an affidavit explaining what efforts it has undertaken to ascertain respondent's military status from the military. It is therefore ordered that petitioner's motion to dispense with the affidavit of nonmilitary service is denied without prejudice to renew upon submission of proof of further investigation as to the status of the respondent.[67]

Courts have been known to read the affidavits very closely. In one case, the affiant indicated that he had spoken with the defendant. The defendant denied being in the military service and was wearing civilian clothes at the time.[68] While one might consider that good enough, the court focused on the fact that the statement was good at the time when the defendant was served and not, as the statute required, "before entering judgment."[69]

As to the technical aspects of the affidavit, the SCRA indicates that the requirement "may be satisfied by a statement, declaration, verification, or certificate in writing, subscribed and certified or declared to be true under penalty of perjury."[70] Amazingly, even these simple requirements have been subject to litigation. An Idaho court, looking at the former provision, held that a verified complaint containing statements as to the defendant's military status complied with the statutory requirement for an affidavit because allegation of non-military service was made under oath.[71]

(3) Persons Protected. Occasionally, a civilian defendant will assert that the plaintiff failed to file an affidavit as to the defendant's military status. The argument of course being that the defendant's rights have been violated and the default judgment should be vacated. In this situation, a Michigan court pointed out that plaintiff's failure to file an affidavit of nonmilitary service before taking default judgment did not prejudice defendants who were

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[66] *Id*.

[67] *Id*. For a similar discussion *see* Benabi Realty Mgmt. Co., LLC v. Doorne, 738 N.Y.S.2d 166 (N.Y. City Civ. Ct. 2001). *See also* Hart, Nininger, & Campbell Assocs., Inc. v. Rogers, 548 A.2d 758, 769 (1988) (plaintiff's proof on nonmilitary status of defendant sufficient).

[68] Nat'l Bank of Far Rockaway v. Van Tassell, 36 N.Y.S.2d 478, 479-80 (N.Y. Sup. Ct. 1942).

[69] *Id*. at 480.

[70] 50 U.S.C.S. app. § 521(b)(4) (LEXIS 2006).

[71] Bedwell v. Bedwell, 195 P.2d 1001 (1948).

admittedly not in military service at the time the default was entered.[72] In a more recent case, it was noted that "[i]f . . . a clerk enters a default judgment on the basis of a defective nonmilitary affidavit, vacature under the [SSCRA] may be had only upon a showing that the defendant was a member of the class to be protected by the act and had a meritorious defense to the claim."[73] As a consequence "[a]bsent such a showing, no matter how irregular the nonmilitary affidavit, the act simply does not afford an independent ground upon which a default judgment can be voided automatically."[74] In any event, the courts have agreed that the affidavit requirement protects only the military defendant who cannot appear in defense.[75] Logical though this outcome may be, it does not obviate the need to ascertain the status of the defendant.

(4) Failure to File Affidavit. There is an argument that the courts are split over the effect of a plaintiff's failure to file the requisite affidavit. Some courts describe the requirement as "mandatory,"[76] and others consider that they must provide a "super-scrupulous review."[77] On the other hand, some courts "disagree" with the "mandatory" characterization,[78] while other courts note that the affidavit must be specific about the person's status at the time of the default judgment,[79] and that the declaration of default is distinct from the judgment itself.[80] The logic and analysis, however, run a bit deeper as the courts should ultimately recognize that the failure to file an affidavit when the person is in the military service does have consequences:

> It will be observed that the filing of the military affidavit is not made a jurisdictional matter. The Act authorizes entry of judgment notwithstanding the

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[72] Haller v. Walczak, 79 N.W.2d 622 (1956).

[73] Citibank, N.A. v. McGarvey, 765 N.Y.S.2d 163, 170 (N.Y. City Civ. Ct. 2003).

[74] *Id*.

[75] *See, e.g.*, Tabas v. Robert Dev. Co., 297 A.2d 481, 484 (1972) ("only a defendant actually in the military service of the United States may take advantage of the Plaintiff's failure to file the proper non-military affidavit since the Act and Local Rules of Court adopted to supplement it, were designed solely to protect only persons in the military service"). *See also* Franklyn v. Elliott, 188 A.2d 345 (D.C. 1963); Miller v. Werner, 185 A.2d 723 (D.C. 1962); Vision Serv. Plan of Penn. v. Penn. AFSCME Health and Welfare Fund, 474 A.2d 339 (Pa. Super. Ct. 1984); Carberry v. Fleet, 32 Pa. D & C3d 574 (1984); Poccia v. Benson, 208 A.2d 102 (1965).

[76] Murdock v. Murdock, 526 S.E.2d 241, 247 (1999).

[77] *McGarvey*, 765 N.Y.S.2d at 170.

[78] PNC Bank, N.A. v. Kemenash, 761 A.2d 118, 120 (2000).

[79] Nat'l Bank of Far Rockaway v. Van Tassell, 36 N.Y.S.2d 478, 479-80 (N.Y. Sup. Ct. 1942).

[80] Interinsurance Exchange of the Automobile Club of S. California v. Collins, 37 Cal. Rptr.2d 126 (1994).

> absence of the affidavit when an order of court directing such entry has been secured. The failure to file such affidavit does not affect the judgment, and is only an irregularity. . . .
>
> When the judgment is rendered without filing the requisite affidavit, the courts have uniformly ruled that the judgment is not void, but only voidable, subject to being vacated at the instance of the service member, but only upon proper showing that he has been prejudiced by reason of his military service in making defense.[81]

(5) False Affidavits. The SCRA makes it a federal misdemeanor to file a false affidavit.[82] A case involving a process server is illustrative of how a person might come to run afoul of this sanction. In *United States v. Kaufman*,[83] Kaufman worked as a process server for an attorney who apparently did volume collection work.[84] He was found guilty of falsely swearing on ninety counts for violating the SSCRA.[85] The story of his crimes was summed up as follows:

> In these affidavits, Kaufman represented that he had personally spoken to the defaulting defendants and had determined that they were not in the military service. The appellant conceded at trial that these conversations never took place. In the course of the customary routine of the office, a fellow employee delivered the non--military affidavits, often in large batches, to Kaufman's desk for his signature; some contained the name of the subject defendant and others left a blank where the name was supposed to be. In either event Kaufman signed them all. When he finished, he returned the documents to the clerk from whom he had received them, or he took them personally to a notary public in the office. The affidavits were then stamped and signed by the notary, but, according to Kaufman and one of the office notaries who testified at the trial, no oath was ever

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[81] Thompson v. Lowman, 155 N.E.2d 258, 261, *aff'g*, 155 N.E.2d 250 (Ohio C.P. 1958). *Id.* at 261. In fact, notwithstanding the *Kemenash* court's terse statement, its analysis of a state law provision and the SSCRA shows that it recognizes as well the notion that the absence of an affidavit means the judgment "is not void but voidable." *Kemenash*, 761 A.2d at 121. *See also* Hawkins v. Hawkins, 999 S.W.2d 171, 174 (Tex. App. 1999); Hernandez v. King, 411 So.2d 758 (La. Ct. App. 1982).

[82] 50 U.S.C.S. app. § 521(c) (LEXIS 2006).

[83] 453 F.2d 306 (2d Cir. 1971).

[84] *Id*. at 308.

[85] *Id*.

administered even though each document concluded with the words "Sworn to before me this day . . ."[86]

Of course an attorney can be subject to disciplinary action for lack of candor before a tribunal[87] for filing a false affidavit or for "offer[ing] evidence that the lawyer knows to be false."[88] Alternatively, an attorney could be sanctioned for lack of competence for inattentiveness and neglect if the affidavit is not proper in some respect.[89] The attorney must also take care when attesting to the veracity of the client's information. As noted, there has to be an investigation into the person's status lest the court be left to ponder "why counsel expose themselves to potential problems by filing non-military affidavits where counsel's knowledge is based upon information passed on by the client."[90]

In sum, the courts will be disturbed over a false affidavit. While a false affidavit may not obviate the need to look into whether the service has caused a material effect and whether the defendant has a meritorious defense, it may seriously curtail that analysis. This is because "[i]t certainly is not within the spirit and intent of the act that they be deprived of these defenses when there is a showing that knowledge that a defendant was in service was fraudulently withheld from the court.[91]

(6) Status of Servicemember Unknown. As can be seen from the foregoing, many controversies surrounding the affidavit requirement come about from affidavits which allege that the defendant is not in the military service, a failure to file an affidavit, and false affidavits. The main requirements for what to do when the defendant is serving on active duty are discussed in the subsection concerning court appointed attorneys, below. Before looking at those requirements, it is worth considering what the plaintiff and court must do when the plaintiff is unable to ascertain the defendant's status.

When it is not possible to know whether the defendant is in military service, the court "may require the plaintiff to file a bond."[92] Simply stated, if the defendant turns up and "is . . . found to be in military service, the bond shall be available to indemnify the defendant against any loss or

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[86] *Id*.

[87] MODEL RULES OF PROF. CONDUCT R. 3.3(a)(1) (2002).

[88] *Id*. at R. 3.3(a)(3).

[89] *Id*. at R. 1.1. *See, e.g.*, Att'y Grievance Comm'n v. Kemp, 641 A.2d 510 (1994) (attorney not sanctioned, but blank spaces on military affidavits called into question his competence).

[90] Toyota Motor Credit Corp. v. Montano (*In re* Montano), 192 B.R. 843,846 (D. Md. 1996).

[91] Kirby v. Holman, 25 N.W.2d 664, 676-7 (1947).

[92] 50 U.S.C.S. app. § 521(b)(3) (LEXIS 2006).

damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant."[93]

(7) Timing of Motion for Default. In a traditional sense, one often thinks of default judgments being entered shortly after a defendant fails to answer or otherwise appear in a case. Things can be more complicated and a judgment tantamount to a default judgment can occur at any time. In fact, the SCRA defines judgment very broadly to include "any judgment, decree, order, or ruling, final or temporary."[94] Thus, focus needs be placed on the meaning of any court decision.

The notion that a default judgment can occur at any time during the course of litigation is most apt to be true when the litigation involves a family law matter. A marriage may be dissolved, but certain issues which were previously resolved such as visitation, debt allocation, and child support can be then subsequently revisited. When that happens, the servicemember may have participated fully in the litigation, but the nature of the service of process, their appearance and so on need to be examined on their own merits at subsequent proceedings. In *Murdock v. Murdock*,[95] the parties were divorced in 1997. The order dissolving the marriage also commanded that the parties reach an agreement as to the payment of certain debts.[96] As one might guess, they were not able to do so. Although the trial court originally continued a hearing on child support to allow the husband more time to obtain counsel, it ultimately entered a judgment against him for child support and debt allocation.[97] The appellate court found that this judgment was in fact a default judgment and subject to scrutiny under the SSCRA.[98] The servicemember, being stationed in Japan, was materially affected by his military service.[99] His alleged payment of the child support was a meritorious defense.[100] More importantly, even though the husband had waived his rights under

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[93] *Id*.

[94] *Id*. app. § 511(9).

[95] 526 S.E.2d 241 (S.C. App. 1999).

[96] *Id*. at 243.

[97] *Id*. at 244.

[98] *Id*. at 246.

[99] *Id*.

[100] *Id*. at 247.

the SSCRA in the original action, it was held that this subsequent proceeding "was a separate action."[101]

b. Court-Appointed Attorney. As previously stated, in every civil suit where a party seeks to default the opponent, the moving party must file an affidavit indicating that the defendant is not in the active military service, that it cannot be determined whether the defendant is in the military service, or that the defendant is in the military service. Although much of the litigation discussed thus far is relevant to the latter possibility, this subsection will discuss the primary requirements that follow from a declaration by the movant that the party in default is in military service.

(1) General. If the plaintiff/moving party determines that the defendant/party in default is in the military service, then "the court *may not* enter a judgment until after the court appoints an attorney to represent the defendant."[102] By adopting the SCRA provisions, Congress has meant to strengthen and clarify the law's requirements. Thus, much of the prior case law is still relevant as a guide to proper interpretation.

That being said, there has always been a number of questions about the court-appointed attorney's role. This may have been due, in part, to the fact that the prior legislation contained two provisions offering differing wording regarding the court-appointed attorney. One passage indicated that a court "may appoint" the attorney[103] and the other indicated that the court "shall" appoint.[104] In the first instance, the appointment was permissive when it was known that the party was in the military service and had not yet appeared.[105] The appointment was mandatory before entry of a default judgment where there was a default of appearance and where "an affidavit is not filed showing that the defendant is not in the military service."[106] Under these circumstances, the attorney's role was defined "to represent [the] defendant and protect his interest."[107]

The modern provision is obviously clearer as it works to make the appointment a prerequisite to entry of the default judgment. Even so, the scope of the representation is worth considering further as well as certain other attendant issues.

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[101] *Id*. at 247. Although the court was concerned with what it saw as a failure to apply mandatory SSCRA requirements, it also found that the failure to provide notice to the servicemember about the substance of the hearing in question violated due process standards. *Id*. at 247-8.

[102] 50 U.S.C.S. app. § 521(b)(2) (LEXIS 2006).

[103] 50 U.S.C. app. § 520(3) (2000).

[104] *Id*. app. § 520(1).

[105] *Id*. app. § 520(3).

[106] *Id*. app. § 520(1).

[107] *Id*.

(2) Appearance/Prior Representation. It is axiomatic that the need to appoint an attorney does not come about if the defendant already has an attorney. Additionally, there is no need to resort to this section of the protection unless the defendant has defaulted of any appearance whatsoever.[108] For example, the California Supreme Court held that this protection was designed to protect defendants in military service who do not appear by ensuring appointment of attorneys to represent them. The section did not protect a defendant who had appointed his own attorneys to protect his interests.[109] An interesting situation can arise when a servicemember retains an attorney from previous, related litigation. In such a situation, the California court ruled that, where notice of a wife's motion to modify a support order was served upon an absent husband's attorney in the original divorce action, but the attorney stated he was no longer authorized to represent defendant and had not been able to communicate with the husband, it was error to fail to appoint an attorney.[110]

(3) Functions of the Court-Appointed Attorney. The SCRA is a bit vague on the functions the court-appointed attorney is to perform. It does talk, at one point, about attempting to locate the servicemember.[111] Broadly, the attorney can be thought of and has been described as a guardian *ad litem*[112] or as an attorney *ad litem*.[113] One author has noted that an "appointed attorney is under an obligation to exhaust every reasonable means of establishing contact with the service member prior to trial date so that some logical course of action can be agreed upon."[114] In one case, the court found that the purpose of the appointed counsel is to obtain a stay for the defendant.[115] In fact, the current statute suggests that obtaining a stay is among the attorney's duties.[116]

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[108] For a discussion of the appearance element, *see supra* para. 3-3a.

[109] Reynolds v. Reynolds, 134 P.2d 251 (1943).

[110] Allen v. Allen, 182 P.2d 551 (1947). *See also supra* para. 3-4(b)(4).

[111] 50 U.S.C.S. app. § 521(b)(2) (LEXIS 2006).

[112] *See* Rutherford v. Bentz, 104 N.E.2d 343 (1952).

[113] *In re* Ehlke's Estate, 27 N.W.2d 754 (1947).

[114] Dwan V. Kerig, *The Absent Defendant and the Federal Soldiers' and Sailors' Civil Relief Act*, 33 N.Y.U. L. REV. 975, 980 (1958).

[115] In re *Ehlke's Estate*, 27 N.W.2d at 757.

[116] *See* 50 U.S.C. app. § 521(d).

One aspect of the "representation" which is clear concerns the non-binding nature of anything the attorney does on behalf of the servicemember. Under the prior law, it was clear that nothing a court appointed attorney did could amount to an appearance on behalf of a service member.[117] The prior legislation indicated that "no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."[118] Under the new legislation the provision has changed to indicated that "[i]f an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember."[119] Thus, even under the newer provision, the attorney's presence would not amount to an appearance on behalf of the absent servicemember. The only open question would be whether the acts of the attorney serve to bind the defendant-servicemember when the attorney is able to locate that servicemember.

Of course, once servicemembers begin authorizing acts by their appointed attorneys, they will ordinarily be bound thereby. The Supreme Court of Washington has said:

> It appears from the language of the Act that the protection afforded a service member from any waiver of his rights by legal counsel was intended to apply only where the attorney acted under authority of the court, rather than authority of the service member. In each case a question of fact exists; *i.e*., whether service member has, himself, authorized the attorney to act for him. That the attorney was originally appointed under the act is no wise determinative of this question.[120]

It is also obvious that there are limits on what the attorney should do; that is, there are things the attorney should not do. In one case, the appointed counsel looked to examine the file, gauge whether his client's interest was at stake, and obtain "a stay to enable him to consult his client."[121] The court granted the stay but additionally it may have sent him off on a tangent when it allowed that the stay would be for "ample time to make an investigation and 'array' his witnesses

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[117] *See, e.g.*, *Rutherford*, 104 N.E.2d at 346. *See also* Kerig, *supra* note 114, at 981.

[118] 50 U.S.C. app. § 520(3)(2000). A servicemember's actions could change the course of events. For example, as one court remarked, "[o]nce the appellant knew of the action and authorized his court-appointed attorney to appear on his behalf, the appellant was no longer entitled to further benefits under the Soldiers' and Sailors' Civil Relief Act of 1940." In the Matter of Roslyn B. v. Alfred G., 635 N.Y.S.2d 283, 284, 222 A.D.2d 581, 582 (1995).

[119] 50 U.S.C.S. app. § 521(b)(2) (LEXIS 2006).

[120] Sanders v. Sanders, 388 P.2d 942, 945 (1964). *See also* Bell v. Nugent (*In re* Nugent), 955 P.2d 584, 589 (Colo. App. 1997) ("question of fact whether a member has authorized an attorney to act").

[121] *In re* Ehlke's Estate, 27 N.W.2d 754, 755 (1947).

and present the matter as fully as possible."[122] As one can guess, the attorney proceeded from that point to do quite a few things on his client's behalf, although he ultimately did very little in the way of communicating with his client.[123] In any event, the state supreme court characterized the representation as "alleged service"[124] and held that "the utmost service of a person appointed to appear for a soldier in the military service, either required or suggested, is toward procuring a temporary stay of proceedings as is necessary to protect the soldier's interest."[125]

In reality, the chores for the court-appointed attorney may be a bit broader than merely asking for a stay of the proceedings. Even if a continuance is the ultimate goal, it is hard to argue that the following guidance from a trial court to its appointed counsel is overdone:

> 1. contact the defendant and assure that defendant has actual notice of the lawsuit,
>
> 2. advise defendant of the protections of the Soldiers' and Sailors' Civil Relief Act,
>
> 3. advise defendant of the possibility of entry of default judgment and of the consequences of such a judgment,
>
> 4. ascertain whether defendant's ability to appear and defend his or her legal interests is affected in any way by defendant's military status, and
>
> 5. if the defendant wishes, move for a stay of the proceedings to enable defendant to obtain counsel or prepare a defense on the merits of the case.[126]

Although the appointment of an attorney in these types of matters is onerous and time-consuming, it is not something to be taken lightly. As *Kramer v. Kramer*[127] establishes, inattentive practices such as appointing the attorney "some minutes before trial was to begin"[128] are frowned upon.

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[122] *Id*. at 756.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 757. *See also* Rutherford v. Bentz, 104 N.E.2d 343, 345 (1952) (improper for appointed counsel to have "examined witnesses and acted as attorney for the defendant").

[126] State of Alaska *ex rel*. Dew v. Superior Court, 907 P.2d 14, 14 n.2 (Alaska 1995).

[127] 668 S.W.2d 457 (Tex. App. 1984).

[128] *Id*. at 458.

(4) Failure to Appoint Attorney. As with the failure to file an affidavit, the failure to appoint an attorney renders the judgment voidable, but not void. Once it is established that the court has missed this step, the inquiry will turn to whether the defendant's military service has materially affected or prejudiced his/her ability to defend the action and, if so, whether the defendant has a meritorious defense.[129]

(5) Court-Appointed Attorney Compensation. The SCRA is silent concerning whether and how to pay the attorney for his/her involvement in the case. A New Jersey court, in dictum, stated:

> Ordinarily the services rendered by proctor and counsel so appointed are to be regarded as a patriotic duty for which no compensation would be expected by members of a profession deeply imbued by a sense of public responsibility. Certainly not as against a party in military service. However, in cases in which allowances are commonly made according to the usual probate practice, there seems no good reason why reasonable compensation should not be awarded.[130]

Similarly, the Wisconsin Supreme Court held that the county court should pay the attorney, but the "compensation . . . should be measured by compensation commonly allowed to those in the public service, rather than the fees ordinarily chargeable between attorney and client."[131] Setting the fee is one thing, but determining who pays is another. As the Wisconsin court indicated, it should be the court. Others have come to the same conclusion.[132] Another court held that the plaintiffs would bear the costs.[133] If it is a probate matter, then perhaps the compensation will come from the estate.[134] In other jurisdictions, the result may depend on who prevails, but in others a local rule may be in place.[135]

3-5. Stays of Civil and Administrative Proceedings

a. General. One of the most significant SCRA benefits calls for stays of civil and administrative proceedings. This provision is of obvious benefit to members of the Guard and

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[129] Hawkins v. Hawkins, 999 S.W.2d 171 (Tex. App. 1999);

[130] *In re* Cool's Estate, 18 A.2d 714, 717.

[131] *In re* Ehlke's Estate, 27 N.W.2d 754, 759 (1947).

[132] *In re Cool's Estate*, 18 A.2d 714 at 717.

[133] Barnes v. Winford, 833 P.2d 756, 758 (Colo. App. 1991).

[134] *In re* Ehlke's Estate, 27 N.W.2d at 759.

[135] *See* State of Alaska *ex rel*. Dew v. Superior Court, 907 P.2d 14 (Alaska 1995) (providing a discussion of this point).

Reserves who are in the middle of litigation but called to rapidly mobilize. It is of benefit to members of the active component when they face suit while deployed or otherwise when they are a significant distance from the courtroom.[136]

The SCRA actually contains several stay provisions.[137] The main provision, broadly applicable to civil and administrative proceedings, is as follows:

50 U.S.C. app. § 522

> (a) Applicability of section. This section applies to any civil action or proceeding in which the plaintiff or defendant at the time of filing an application under this section----
>
> > (1) is in military service or is within 90 days after termination of or release from military service; and
> >
> > (2) has received notice of the action or proceeding.
>
> (b) Stay of proceedings.
>
> > (1) Authority for stay. At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.
> >
> > (2) Conditions for stay. An application for a stay under paragraph
> >
> > (1) shall include the following:
> >
> > > (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
> > >
> > > (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current

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[136] This is not to say that distance from the proceeding will necessitate a stay, but merely a brief comment on the law's obvious utility.

[137] *See* 50 U.S.C.S. app. § 531(b) (LEXIS 2006) (stays of evictions and distress proceedings); *id.* app. § 532 (c)(2) (stays of repossession actions under installment contracts); *id*. app. § 533(b) (stays of mortgage foreclosures); *id*. app. § 591 (stays of contract enforcement).

> military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.
>
> (c) Application not a waiver of defenses. An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).
>
> (d) Additional stay.
>
> > (1) Application. A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.
> >
> > (2) Appointment of counsel when additional stay refused. If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.
>
> (e) Coordination with section 201. A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201.
>
> (f) Inapplicability to section 301. The protections of this section do not apply to section 301.[138]

b. Stay Basics. Stays of civil proceedings are available to those in the military service; that is, those who serve on active duty at the time of a court hearing. The protection is exclusive to them and not available to dependents[139] and others.[140] This can, nonetheless, come up as an issue and some courts have not been quite as restrictive. Stated differently, if the servicemember is neither the plaintiff nor the defendant, does this mean that his associates who are not in the military can seek the protection of the Act? The answer to the question depends to a large part on the legal relationship of the servicemember not only to the issue in controversy, but also to the

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[138] *Id.* § 522.

[139] Jusino v. New York City Housing Authority, 255 A.D.2d 41, 691 N.Y.S.2d 12 (N.Y. App. Div. 1999).

[140] Heck v. Anderson, 12 N.W.2d 849 (1944). *But see* Semler v. Oertwig, 12 N.W.2d 265 (1943).

parties involved. One court has held that co-makers of a note are entitled to a stay based on the military service of one of the co-makers.[141] Other courts have reached the opposite conclusion, however, in the following situations: when defendant's counsel was unavailable because of military service;[142] when witnesses were unavailable because of military service;[143] and in the case of an auto accident, when the defendant, supervising driver, was negligent, at the time of the accident, in supervising the now absent co-defendant driver who had been driving on a learners' permit.[144]

In contrast to the default protections, the stay protection is applicable to proceedings where the servicemember has notice of the proceeding.[145] This is an important point because it sets up the stay protection as an alternative approach that servicemembers may take. It is applicable whether the servicemember is a plaintiff or a defendant.[146] In comparison, under the default protections the servicemember will ordinarily be the defendant in the proceeding, although it is possible that a plaintiff could suffer a default for lack of appearance on a counterclaim, or perhaps the original plaintiff/petitioner in a case might suffer a default later on a motion to modify.[147]

In order to obtain a stay, a servicemember must send "a letter or other communication" to the court explaining to the court how the servicemember's "military duty requirements materially affect the servicemember's ability to appear"[148] and stating "when the servicemember will be available to appear."[149] *Also,* the servicemember's request must include

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[141] *See* 50 U.S.C. app. § 513; Hempstead Bank v. Gould, 282 N.Y.S.2d 602 (1967). *See also supra* para. 3-7a.

[142] Grimes v. State of Oklahoma, 377 P.2d 847 (1963).

[143] Moulder v. State, 162 S.E.2d 785 (1968).

[144] Forker v. Pomponio, 158 A.2d 849 (1960).

[145] 50 U.S.C. app. § 522(a)(2) (LEXIS 2006).

[146] *Id*. app. § 522(a).

[147] *See supra* para. 3-4a(7).

[148] 50 U.S.C. app. § 522(b)(2)(A).

[149] *Id*.

a letter or other communication from her/his commander[150] stating that the servicemember's current military duty prevents appearance and "that military leave is not authorized."[151]

Although the commander does not have to provide any further explanation, relate facts nor set a date for when the servicemember can attend, it would be best if the commander elaborated on the facts and, if known, set out a date for the servicemember's attendance. Similarly, regardless of the statute's actual requirements, a statement from the servicemember about leave availability is probably in order.[152]

As to the other basic criteria, the request for the stay can come while the servicemember is on a tour of military service or "within 90 days after termination of or release from military service."[153] Thus, like many SCRA protections, this one extends beyond the time the servicemember is on active duty. As noted the court must grant the request when it comes from the servicemember, but it can do it on its own when it is otherwise aware that the servicemember, with notice, is in the military service.[154] In the event the servicemember's

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[150] *Id*. app. § 522(b)(2)(B).

[151] *Id.*

[152] Under the former legislation leave was not mentioned in the statute, but it was, nevertheless, in the foreground. Failure by the servicemember to demonstrate that he requested leave and was turned down, or that he had no leave available was usually fatal to a stay request. *See, e.g.*, Hibbard v. Hibbard, 431 N.W.2d 637 (Neb. 1988) (soldier failed to use thirty-eight-day stateside leave to resolve pending support modification motion). *See also*; Bowman v. May, 678 So.2d 1135 (Ala. Civ. App. 1996) (servicemember-plaintiff did not try to get leave or otherwise proceed with cause of action); Underhill v. Barnes, 288 S.E.2d 905 (1982) (when soldier made no showing of attempt to request leave, court took judicial notice of military leave statute to assume Soldier had 50 days of leave accrued based upon length of service); Zaki v. Bryan, 403 N.Y.S.2d 765 (N.Y. App. Div. 1978) (noting entitlement to thirty days leave); Judkins v. Judkins, 441 S.E.2d 139, 142 (1994) (trial court found that servicemember "has failed to exercise good faith and proper diligence in appearing and resolving his case"); and Palo v. Palo, 299 N.W.2d 577, 579 (S.D. 1980) (no stay where servicemember husband "failed to show that he was unable to obtain leave, but he also failed to show that he had even tried to obtain leave"). In tongue-in-cheek fashion, one court denied a stay where the servicemember had not sought leave and where his attorney had asserted that the case could not go forward until after the servicemember had completed a career in the Army and "until we are well into the 21st century." Ensley v. Carter, 538 S.E.2d 98, 100 n.1 (2000). On the other hand, servicemembers who could not obtain leave should be awarded the stay. Keefe v. Spangenberg, 533 F. Supp. 49 (W.D. Ok. 1981) (court would not grant stay for entirety of servicemember's training but would until he finished training and was otherwise able to obtain leave); Allen v. Howard, 384 S.E.2d 894 (1989) (abuse of discretion for trial court to deny request where Sailor could not obtain leave while attending military training); Hawkins v. Hawkins, 999 S.W.2d 171 (Tex. App. 1999).

[153] 50 U.S.C. app. § 522(a)(1) (LEXIS 2006).

[154] *Id*. app. § 522(b)(1).

military duty continues to affect his/her ability to attend to the matter, the servicemember can ask for an additional stay with proof of the same sort that would lead to an initial 90-day stay.[155]

Some other basic matters include that the other party should be given notice and an opportunity to be heard on the stay request.[156]

c. Material Effect. Before addressing some of the more technical aspects of this protection, it should be noted that material effect is a recurring concept throughout much of the SCRA. As far as the right to a stay of proceedings goes, it is the central issue.[157] Looked at a bit differently, the concept means that "[t]he act cannot be construed to require a continuance on a mere showing that the defendant is in the military service."[158] In general, a servicemember who is being sued in a court a mile from his duty station and residence should be able to make most trial dates just as any other citizen, unless that soldier is out of the area for temporary duty, deployed, or on a field training exercise.[159]

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[155] *Id*. app. § 522(d).

[156] City of Cedartown v. Pickett, 22 S.E.2d 318 (1942); Gunnells v. Searboard A. R. Co., 204 S.E.2d 324 (1974); *see also* Howard v. Howard, 48 S.E.2d 451, 452-3 (1948) (motion for stay should not be *ex parte* and neither should motion to vacate).

[157] In fact, the leading case is probably the Supreme Court case, *Boone v. Lightner*, 319 U.S. 561 (1943). As is often noted, the Court stated that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Id*. at 575. It should be noted, however, that the Court also outlined the analysis that other courts have followed when determining whether a stay is warranted. Ironically, the case involved an attorney and the Court did not find a stay was warranted; that is that the service had materially affected the servicemember's ability to litigate the case. To the contrary "[i]nstead of seeking the first competent forum and the earliest possible day to lay his accounts out for vindication, he sought to escape the forum and postpone the day." *Id*.

[158] Hibbard v. Hibbard, 431 N.W.2d 637, 639-40 (Neb. 1988). *See also* Hackman v. Postel, 675 F. Supp. 1132, 1134 (E.D. Ill. 1988 ("mere contentions of unavailability, without affirmative representations that leave to attend the trail was sought by the serviceman and refused, are insufficient to warrant the imposition of relief").

[159] Consider the following recitation:

> Here, . . . the movant resided in the county where the suit was brought. His work was in the environs of the same city. It did not take all of his time. He was able to be present and testify, not only at the trial, but at two other hearings. The case was stayed under his plea for over 18 months. He was able to secure depositions from witnesses in California during that time (the inaccessibility of these witnesses being one of his grounds of application). So far as the record shows,

As a preliminary matter, it is immaterial that a delay or inconvenience may result from a stay. A stay is "a proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to 'provide for the common defense.'"[160] On the other hand, the section cannot be used by a party to shield wrongdoing or lack of diligence,[161] or be used as an instrument by which one in the military service may endanger the peace, health, and lives of people by staying proceedings intended to protect the general public.[162]

In construing the former SSCRA stay provision, several courts have interpreted the question as one that resides within the sound discretion of the trial court. Questions about what

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> he made no application to the military authorities for leave of absence in order to obtain additional time to prepare his defense in this case.

Brown v. Brown, 437,80 S.E.2d 2, 8 (1953). *Compare* Cox v. Yates, 100 S.E.2d 649 (1957). *See also* Foster v. Alexander, 431 S.E.2d 415 (1993) (court set matter for trial following servicemember return from overseas assignment). In addition to distance, the servicemember's ability to obtain leave is often a relevant, if not determining, factor. *See, e.g.*, Phelps v. Fowler, 688 N.E.2d 558, 562 (1995) ("The affidavit disclosed no attempt to obtain leave, nor did it disclose that the defendant spoke to his commanding officer or the judge advocate general officer concerning leave"). *See also supra* note 152.

[160] Semler v. Oertwig, 12 N.W.2d 265, 269 (1943).

[161] *See Cox*, 100 S.E.2d at 652 ("The act is to be given a liberal construction in favor of soldiers and sailors to be protected thereby, but it should not be used as an instrument of oppression or a means of defeating an orderly and expeditious trial"). *See also In re* Burrell, 230 B.R. 309, 313 (Bankr. E.D. Tex. 1999) (servicemember "wholly failed to present any evidence"); Riley v. White, 563 So.2d 1039 (Ala. Civ. App. 1990) (stay denied where Soldier failed to voluntarily submit to paternity test before going overseas, after having been granted a previous continuance by court to get tested); Hibbard v. Hibbard, 431 N.W.2d. 637 (1988) (servicemember who refuses to obey court visitation orders and is in contempt of court is not entitled to a stay in change of custody action); Judkins v. Judkins, 441 S.E.2d 139 (1994) (stay denied when Soldier received several continuances and stays because of military duty in Persian Gulf conflict, but upon return refused to comply with court discovery orders).

[162] Technically, neither the SSCRA nor the SCRA exclude any type of administrative or civil matter from their reach. Still, there are a few reported decisions which seem to indicate that certain matters are beyond the scope. *See, e.g.*, Baskin v. Meadors, 27 S.E.2d 696 (1943 (public nuisance); *City of Cedartown* **need citation here** (case involving public nuisance outside the SSCRA's reach); State *ex rel*. Swanson v. Heaton, 22 N.W.2d 815 (1946) (public nuisance).

constitutes material effect are certainly open for the courts to determine. That is where their discretion comes in and that is where the inquiry should focus.[163]

Congress' thoughts on material effect are, nonetheless, enlightening:

> Stays *should be automatic* if they meet several criteria which adequately place the court on notice when a case may proceed. First, [50 U.S.C. app. § 522] would place an obligation on the servicemember to demonstrate material effect [sic] by providing a factual basis for supporting the stay request. *See Boone* v. *Lightner*, 319 U.S. 561 (1943) (trial courts must use discretion in determining material effect [sic] based on facts presented); *Plesniak* v. *Wiegand*, 31 Ill. 3d 923, 335 N.E. 2d 131 (Ill. App. Ct. 1st District 1975) (party must establish that military status is proximate cause of inability to appear); *Lackey* v. *Lackey*, 222 Va. 49, 278 S.E. 2d 811 (Va. 1981) (affidavit from the commander revealing sailor was serving sea duty and unable to attend sufficient to establish right to a stay); *Hibbard* v. *Hibbard*, 230 Neb. 364, 431 N.W. 2d 637 (Neb. 1988) (determination of a stay depends upon the facts and circumstances of each case). An important component of this requirement would be the servicemember's responsibility to provide a date on which the he or she would be available to appear. *See Tabor* v. *Miller*, 389 F. 2d 645, *cert. denied, Stearns* v. *Tabor*, 391 U.S. 915 (3d Cir. 1968) (servicemember did not provide evidence it was impossible for him to appear); *Zitomer* v. *Holdsworth*, 449 F.2d 724 (3d Cir. 1971) (servicemember failed to avail himself of SSCRA provisions).[164]

If a court finds material effect (and that the service member is unavailable to defend), the court must order a stay.[165] If the stay request is denied, a good rule of thumb is for the court to make findings of fact about the lack of material effect, or ensure there is sufficient evidence in the record to warrant denial.[166]

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[163] *See, e.g.*, Coburn v. Coburn, 412 So.2d 947 (Fla. Ct. App. 1982) (trial court abuse of discretion). *Compare* Power v. Power, 720 S.W.2d 683 (Tex. Ct. App. 1986) (mere statement that party is in the military service is insufficient).

[164] H.R. REP. NO. 108-81, at 38 (2003) (emphasis added).

[165] *See, e.g.*, Smith v. Smith, 149 S.E.2d 468, 470 (1966) ("intensive training at Fort Bragg, North Carolina, in preparation for active duty in Viet Nam"); Lackey v. Lackey, 278 S.E.2d 811, 812 (1981) ("trial court erred in denying . . . a continuance . . . [where the servicemember] was serving on board a Navy ship on sea duty and was unable to leave the ship").

[166] Olsen v. Olsen, 621 N.E. 2d 830 (Ohio 1993).

Finally, in deciding whether to grant a stay, a court must consider all the facts and circumstances.[167] This "does not imply a power to stay in anticipating that at some future time in the litigation's progress the ability of the service man to prosecute or defend may be materially affected by reason of his military service."[168]

d. Common Law Rules. While the current statute and its predecessor[169] imply a relatively straightforward inquiry, the courts have been known to inquire into whether the servicemember is a necessary party or otherwise required to attend the proceedings. The inquiry turns, then, on whether the servicemember's case will be prejudiced by his/her absence.

The Court of Appeals of Ohio explained this development in the case of *Olsen v. Olsen.*[170] First, they reasoned that "it was improper to deny a motion to stay proceedings without findings by the court that the soldier's ability to defend is not materially affected by military duties."[171] Obviously, this part of the analysis is based on the statute. It went on to note, however, that "unless it is a situation in which no harm could accrue by reason of his absence, generally recognized as an exception in the statute, a member of the military service is entitled as of right to the stay."[172]

It is one thing to determine that a servicemember is not a necessary party. There is also some logic to this rule even though it does extend beyond the statutory language. If a party's presence is unnecessary, then there is no need to reach the question about whether or not the person's circumstances (military duties) preclude attendance. For example, the Mississippi

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[167] *See, e.g.*, Hibbard v. Hibbard, 431 N.W.2d. 637 (1988)

[168] Sullivan v. Storz, 55 N.W.2d 499, 504 (1952).

[169] The former statute read as follows:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as a plaintiff or defendant, during the period of such service or within sixty days thereafter, may in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

50 U.S.C. app. § 521 (2000).

[170] 621 N.E2d 830 (1993).

[171] *Id*. at 830 (citing Coburn v. Coburn, 412 So.2d 947 (Fla. Dist. Ct. App. 1982)).

[172] *Id*. (quoting Mays v. Tharpe & Broooks, Inc., 240 S.E.2d 159 (1977)).

Supreme Court found a military father was not a necessary party in a child custody proceeding involving the mother and the children's paternal grandmother.[173] It is another thing, however, for a case to turn on a consideration of the substance of the proceeding rather than on the question about whether the servicemember's duty materially affects his/her ability to attend. For example, there is a line of cases indicating that in a personal injury case, it is the insurance company and not the insured servicemember who is the real party in interest.[174]

Consider also the result in the case of *Shelor v. Shelor*.[175] In that case, the Georgia Supreme Court held that temporary modifications of child support do not materially affect the rights of a military defendant as they are "interlocutory and subject to modification."[176] Stated a bit differently, the court said that "his defense . . . is generally not materially affected by determination of the interlocutory relief sought." Even though the courts have created this examination, and even though it has arguable merit, the focus, for SCRA purposes should be on the impact of the servicemember's duty. In *Shelor*, interestingly enough, the servicemember "was apparently at home during the hearing, and the record is void of any evidence concerning the reason for his failure to attend other than his counsel's bare assertion that [the servicemember] was ordered to direct the movers dispatched that day." [177] Thus, looking aside from the substance of the proceeding, the court had a proper ground for its determination.

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[173] Bubac v. Boston, 600 So.2d 951 (Miss. 1992).

[174] Underhill v. Barnes, 288 S.E.2d 905, 907 (Ga. Ct. App. 1982); Hackman v. Postel, 675 F. Supp. 1132 (N.D. Ill. 1988). *See also* Murphy v. Wheatley, 360 F.2d 180 (5th Cir. 1966) (subrogation claims where real parties in interest are the insurance companies of the parties). Other substantive questions have been looked at similarly. *See, also*, City of Cedartown v. Pickett, 512-13, 22 S.E.2d 318, 321-2 (1942) (due process violation to fail to serve opponent with request to stay, but alternatively SSCRA inapplicable to suit involving a public nuisance); Foster v. Alexander, 431 S.E.2d 415 (case involving policy limits of automobile insurance policy); Jackson v. Jackson, 403 N.W.2d 248 (Minn. Ct. App. 1987); *But see* Wilson v. Speer, 499 N.W.2d 850, (Minn. Ct. App. 1993) (record in denial of stay in child support case must establish why parent's presence unnecessary); Cornelius v. Jackson, 209 P.2d 166, 170 (1948) ("there was no question of fact involved and . . . the questions involved were questions of law"); *In re* Marriage of Peck, 920 P.2d 236 (1996) (lack of personal jurisdiction could be considered in servicemember's absence). *But see* Starling v. Harris, 151 S.E.2d 163 (1966) (servicemember's "presence was essential to a proper defense to this action in tort arising out of an automobile collision to which there were no eyewitnesses other than the parties and to which action the defendant claimed a good defense").

[175] 383 S.E.2d 895 (1989). *Id.* at 896.

[176] *Id.*

[177] *Id.*

On the other end of the spectrum are cases that looked to the substance of the proceeding to seemingly minimize the showing of material effect or otherwise indicating that certain issues inherently require the person's attendance.[178] Ultimately, the question is whether substantive issues and their relative complexity should not determine the outcome. Again, it is one thing to determine that a servicemember has no interest or part in the suit, but care needs to be taken to avoid an outcome where consideration of that point replaces a proper examination the question of material effect. Stated a bit differently, "[a] soldier . . . is not entitled to relief under the Soldiers' and Sailors' Civil Relief Act as a consequence of his membership in the armed services, but, rather, because his defense is materially affected by his military service."[179]

e. Burden of Proof. In the seminal *Boone v. Lightner* decision, the Supreme Court noted that the SSCRA "[made] no express provision as to who must carry the burden of showing that a party will or will not be prejudiced."[180] Nonetheless, the Court stated that "[w]e, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come" and "ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment."[181]

Even so, the courts have, from time-to-time, endeavored to refine this point. Some have reasoned that it is squarely on the servicemember.[182] Others place it on the party standing in opposition to the continuance.[183] Others turn to the Supreme Court's *ad hoc* approach.[184] Regardless, given the legislation's current language calling for a "communication setting forth facts,"[185] it is safe to assume that the burden will normally be on the servicemember.

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[178] Derby v. Kim, 233 S.E.2d 156, 157-8 (1977) (in child custody case involving question of parental fitness, "it should have been obvious from the nature of the issues to be litigated . . . that the father's presence was important"); Mathis v. Mathis, 236 So.2d 755, 756-7 (Miss. 1970) ("a paternity suit is of such a personal and intimate nature that it is implicit that appellant's absence materially affects his defense unless a specific finding is made to the contrary").

[179] Wilson v. Butler, 584 So.2d 414, 416 (Miss. 1991).

[180] Boone v. Lightner, 319 U.S. 561, 569 (1943).

[181] *Id*. at 569.

[182] *See, e.g.*, *Wilson*, 584 So.2d at 416 (quoting Roberts v. Fuhr, 523 So.2d 20, 28 (Miss. 1987) and Mayfair Sales, Inc. v. Sames, 169 So.2d 150, 152 (La. 1964).

[183] Coburn v. Coburn, 412 So.2d 947 (Fla. App. 1982).

[184] Allfirst Bank v. Lewis (*In re* Lewis), 257 B.R. 431 (Bankr. D. Md. 2001).

[185] 50 U.S.C.S. app. § 522(b)(2)(A) (LEXIS 2006).

f. Practical Considerations. Although a servicemember may have a right to a stay based on his/her military service, there is a need to be reasonable. Even if a servicemember can obtain a leave of absence, it has to be asked whether the servicemember's presence truly justifies the expense of round trip airfare. On the one hand, distance, leave accrual, and expense are worth considering as a court determines whether to grant a stay,[186] but they are also factors for a servicemember to consider when examining alternative approaches to an impending court proceeding. After all, "the ability to communicate across the Atlantic Ocean has improved from its condition in 1940."[187] The impact of the Internet, video teleconferencing, and video depositions[188] on court determinations as to the unavailability of servicemembers for civil case discovery has yet to be fully realized. Video teleconferencing or Internet contact, however, should not substitute for servicemembers' physical presence at their trial on the merits as[189] "[t]he opponent of the absent party will always have the edge [at trial]."[190] Still, an assessment of the pros and cons of any situation may lead to a conclusion that little is to be gained in delay.

g. Bankruptcy. Another practical consideration that is worth highlighting is the relationship between the stay provision and bankruptcy proceedings. First, the SCRA is applicable to bankruptcy cases.[191] An issue comes up, however, for the simple reason that the movant will often be the bankruptcy petitioner/debtor. There is a noted irony to the fact that bankruptcy, even under the best of circumstances, works to hamper a creditor's rights or to otherwise diminish what the creditor originally contracted for. A delay in resolution can often work to deepen the creditor's disadvantage, turning the SCRA's stay provision into "a sword against creditors rather than a shield."[192]

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[186] *See, e.g.*, Underhill v. Barnes, 288 S.E.2d 905 (1995).

[187] Massey v. Kim, 455 S.E.2d 306, 307 (1995).

[188] Keefe v. Spangenberg, 533 F. Supp. 49 (W.D. Okla. 1981) (court denied stay request to delay deposition, and suggested that service member agree to videotape deposition in accordance with Federal Rules of Civil Procedure Rule 30(b)(4)); *see also In re* Diaz, 82 B.R. 162, 165 (Bankr. D. Ga. 1988) (service members in Germany may make video depositions for use in trials in the United States, so Section 201 stay is not appropriate to delay discovery).

[189] Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 SANTA CLARA L. REV. 137, 162 (1992).

[190] *Id*. at 165. *See also* Major Howard McGillin, Note, *Stays of Judicial Proceedings*, ARMY LAW., July 1995, at 68, 69-70.

[191] Duggan v. Franklin Square Nat'l Bank, 170 F.2d 922 (2d Cir. 1948).

[192] *In re* Burrell, 230 B.R. 309, (Bankr. E.D. Tex. 1999).

Notwithstanding this irony and the gloss it may put on a court's treatment, it has to be recognized that the stay provision is applicable to both plaintiffs and defendants.[193] Bankruptcy judges will need to examine the issue of material effect just as they would in any other situation.[194]

h. Additional Stays. If a court finds that there has been a proper showing, the SCRA requires that it "shall stay the action for a period of not less than 90 days."[195] When a servicemember requests and is granted a stay, that servicemember may seek a further stay if the situation warrants. The servicemember, that is, "may apply for an additional stay based on the servicemember's ability to appear." [196] In fact, "[t]he same information required [for an initial request for a stay] shall be included in an application [for an additional stay]."[197] Thus, when a court considers this type of request, it should use essentially the same analysis as it would for the initial request.

The most important thing to note about these additional stays, however, is the fact that the court must appoint an attorney if it denies the request.[198] Although this a new requirement brought in by the SCRA, it is not without precedent.[199] As to the attorney's role,[200] the requirement is similar to the appointment of an attorney under the default provisions.[201] Like the default provision, the stay provision states that the attorney is there "to represent the servicemember in the action or proceeding,"[202] but the exact extent of that representation is not defined.

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[193] 50 U.S.C.S. app. § 522(a) (LEXIS 2006).

[194] *Burrell*, 230 B.R. at 313 (no evidence despite servicemember's assignment in Germany). *See also* Allfirst Bank v. Lewis (*In re* Lewis), 257 B.R. 431 (Bankr. D. Md. 2001) (stay granted while servicemember stationed overseas, but matter to move forward given return to continental United States).

[195] 50 U.S.C.S. app. § 522(b)(1).

[196] *Id*. app. § 522(d)(1).

[197] *Id*.

[198] *Id*. app. § 522(d)(2).

[199] *See, e.g.*, Coburn v. Coburn, 412 So.2d 947 (Fla. App. 1982).

[200] *See supra* para. 3-4b for a discussion of the appointed attorney's role under the default protections provision.

[201] 50 U.S.C. app. § 521(b)(2).

[202] *Id.*

i. Welfare Reform Act Interface. The Welfare Reform Act of 1996[203] mandated that the Department of Defense facilitate leave for servicemembers involved in child custody and paternity disputes. Accordingly, the Department has promulgated an instruction indicating that "ordinary leave shall be granted unless . . . [t]he member is serving in or with a unit deployed in a contingency operation; or . . . [e]xigencies of military service require a denial of such request."[204]

3-6. Interface of the Stay Provisions and the Default Protections

For many years, there has been a noted tension between the default and the stay proceeding. Simply put, if a stay request is denied, will the servicemember be barred from challenging the outcome pursuant to the default provisions?[205] In the past, there may have been ways to ask for the continuance, to see it denied and to come back later and successfully set aside a default judgment. There may have been courts willing to allow a request for a continuance as a special pleading and not as a waiver of all defenses,[206] but the best advice was probably as follows:

> Where the service member learns of a default judgment after it has been entered, he or she should immediately obtain counsel and make application to have the judgment opened. If he or she had been truly unaware of the action, there should be little trouble in getting the judgment opened. His or her ultimate success will, of course, depend on the substantive merits of the case.
>
> Where a service member receives notice of a pending action, he or she should immediately enter an appearance and defend. If military duties interfere with the ability to defend, the service member should seek every avenue to be permitted to attend to the court's action. Failing this, a stay of proceedings . . . should be sought. The service member risks denial or [sic] the request and subsequent loss of the right to a court-appointed attorney and may even lose the

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[203] Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[204] U.S. DEP'T OF DEFENSE, INSTR. 1326.7, LEAVE AND LIBERTY PROCEDURES para. 6.22 (22 Apr. 2005).

[205] *See, e.g.*, McGillin, *supra* note 190. Major Garth K. Chandler, *The Impact of a Request for a Stay of Proceedings Under the Solders' and Sailors' Civil Relief Act*, 102 MIL. L. REV. 169, 171 (1983).

[206] O'Neill v. O'Neill, 515 So.2d 1208 (Miss. 1987). *But see* Skates v. Stockton, 683 P.2d 304 (Ariz. App. 1984).

> right to open a default judgment as a result of this appearance. Yet, little is really lost.[207]

With the adoption of the SCRA, Congress appears to want to see litigation channeled in accordance with this viewpoint. They are firm in their confirmation that an unsuccessful request for a stay will preclude resort to the default protections.[208] Thus, when a servicemember has notice of a proceeding, that servicemember will have to decide whether to enter an appearance, attempt to be released from duty to defend, and to defend or whether to await a default judgment and attempt to reopen it at a more convenient time.

It should be noted, however, that Congress tempered this outcome. Implicit in the historical tension between the two choices was the notion that an entry of appearance might work to waive certain defenses. A request for a continuance might work as an entry of appearance and not only preclude later resort to the default protections, but also waive certain otherwise valid defenses that the servicemember would want to protect if s/he could only get to the courthouse. Now, Congress has hopefully allayed this fear by indicating that "[a]n application for a stay . . . does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction)."[209]

Finally, if the servicemember is not immediately available and not in a position to hire counsel, explore a defense, request a stay and otherwise begin to defend, in other words, when the servicemember is about to be defaulted against, the court must look to stay the proceeding for 90 days before entering the default judgment.[210] The default protections include, up front, protection that means to allow the servicemember every opportunity to defend.

3-7. Persons Liable on Servicemember's Obligation

a. Persons who are Primarily and Secondarily Liable with Servicemember. Subsections 513(a) and 513(b) provide those persons who are either primarily or secondarily liable with a servicemember on an obligation or liability with the same rights to delay actions and vacate judgments available to servicemembers.

50 U.S.C. app. § 513(a)-(b)

> (a) Extension of protection when actions stayed, postponed, or suspended. Whenever pursuant to this Act a court stays, postpones, or suspends (1) the enforcement of an obligation or liability, (2) the prosecution of a suit or

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[207] *Chandler*, *supra* note 205, at 178.

[208] 50 U.S.C.S. app. § 522(e) (LEXIS 2006).

[209] *Id*. app. § 522(c).

[210] *See id*. app. § 521(d).

> proceeding, (3) the entry or enforcement of an order, writ, judgment, or decree, or (4) the performance of any other act, the court may likewise grant such a stay, postponement, or suspension to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability the performance or enforcement of which is stayed, postponed, or suspended.
>
> (b) Vacation or set--aside of judgments. When a judgment or decree is vacated or set aside, in whole or in part, pursuant to this Act, the court may also set aside or vacate, as the case may be, the judgment or decree as to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily liable on the contract or liability for the enforcement of the judgment or decree. [211]

Specifically, these subsections allow the court in its discretion to grant stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, accommodation makers, and others.

Sureties and others may find that obtaining a stay is not always easy. For example, a Georgia court held that where liability is joint and several and the action is brought against an accessible civilian party, the proceedings will not be stayed unless the servicemember is a party to the action.[212] Similarly, in *Modern Industrial Bank v. Zaentz*,[213] the court specified that co-obligors are entitled to a stay only if the servicemember is a party to the action and the action has been stayed as to the servicemember. Finally, the right to open a judgment taken against a person in the military service is reserved to that person only and not to a judgment co-debtor.[214]

Other courts have been less interested in the servicemember's status with respect to the litigation.[215] In exercising their discretion "the courts are primarily influenced by two considerations: first, whether the man in service is able to appear and defend, and second,

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[211] *Id*. app. § 513.

[212] Hartsfield Co. v. Whitfield, 30 S.E.2d 648 (1944).

[213] 29 N.Y.S.2d 969 (N.Y. City Mun. Ct. 1941).

[214] J.C. Penney v. Oberpriller, 163 S.W.2d 1067 (Tex. Civ. App. 1942), *rev'd on other grounds*, 170 S.W.2d 607 (1943).

[215] *See, e.g.*, Akron Auto Fin. Co. v. Stonebraker, 35 N.E.2d585 (1941).

whether a default on an obligation by reason of the change in his income will lead to an unjust forfeiture."[216]

b. Codefendants. As previously indicated, a proceeding stayed as to a servicemember may also be stayed as to others primarily or secondarily subject to the same liability. In Section 525,[217] however, the Act allows a court to proceed against other codefendants, notwithstanding a stay as to the servicemember. These codefendants are not among those sureties, guarantors, and so on covered by Section 513.

A Washington state appellate court was presented with the problem of a servicemember driving a vehicle owned by his father. They were named as codefendants in a negligence action. The incident giving rise to the suit was witnessed only by the plaintiff and the absent servicemember/son. The trial court stayed the proceedings as to the son but denied a stay to the father, who was independently liable under the doctrine of imputed negligence. The appellate court held that the denial was within the trial court's discretion.[218]

c. Criminal Bail Bond Sureties. The SCRA offers no protection to the criminal defendant. For example, the law's stay provisions[219] are inapplicable to criminal proceedings. There is, however, some relief with respect to bail bonds and those who serve as sureties for a defendant in military service. The language of subsection 513(c) prescribes that the "court may not enforce a bail bond during the period of military service of the principal on the bond when military service prevents the surety from obtaining the attendance of the principal."[220] Furthermore, "[t]he court may discharge the surety and exonerate the bail in accordance with the principals of equity and justice, during or after the period of military service of the principal."[221]

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[216] Note, 9 U. CHI. L. REV. 348, 349 (1942).

[217] 50 U.S.C.S. app. § 525 (LEXIS 2006).

[218] State *ex rel*. Frank v. Bunge, 133 P.2d 515 91943).

[219] 50 U.S.C. app. § 522.

[220] *Id.* § 513(c).

[221] *Id*. In what may be an anomaly, the Arkansas Supreme Court held, in *dicta*, that the surety must show three things. The court said "the surety is not entitled to relief in the absence of a showing that the principal was in the military service on the date he was scheduled to appear, that the surety made an unsuccessful effort to secure [the principal's] appearance on that date and that [the principal's] military service prevented his attendance on that date." Tri-State Bonding Co. v. State, 567 S.W.2d 937, 942 (1978). The court did not resolve the issue on this ground, however. Instead, the judgment against the surety came because the issue had not been properly raised and preserved. *Id.* The dissent seemed more willing to found its opinion on the plain statutory language and fact that the principal had been serving with the Army in Georgia on the day of trial. *Id.* at 946.

Illustrative of these provisions' application is the case of *United States v. Jeffries*.[222] In that case, the court held that there was no doubt that the principal was in the military. Because of this, it was without authority to forfeit the bail bond and issue a warrant of arrest. Former 50 U.S.C. app. § 513(3) was held to be mandatory.[223] The modern provision's language is no less clear indicating that "[a] court may not enforce a bail bond during the period of military service of the principal on the bond when military service prevents the surety from obtaining the attendance of the principal."[224] In a latter case, a New York court took this one step further, holding that the bond could not be forfeited if the principal was in the service even if he were on furlough at the time he was required to appear.[225]

In *Ex Parte Moore*,[226] however, an Alabama court concluded that military service alone was insufficient to prevent forfeiture of the bail bond without a further showing that military service prevented the principal from attending the trial.[227] Courts echoing this outcome will require the surety show that the principal is in the military and demonstrate an effort to secure the principal's attendance.[228]

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[222] 140 F.2d 745 (7th Cir. 1944).

[223] *Id*.

[224] 50 U.S.C. app. § 513(c). In comparison to the former provision, the modern language is clearer. The former provision stated that "[w]henever by reason of military service of a principal upon a criminal bail bond the sureties upon such bond are prevented from enforcing the attendance of their principal and performing their obligation the court shall not enforce the provisions of such bond during the military service of the principal." 50 U.S.C. app. § 513(3) (2000).

[225] People v. Correa, 43 N.Y.S.2d 266 (1943).

[226] 12 So.2d 77 (1943).

[227] This case should be read with caution because, as the court notes, the SSCRA provision in question "was approved after the conditional judgment [forfeiting the bond] was here rendered." *Id.* at 77. In fact, the *Moore* court was most concerned to note that a bond forfeiture results in a final, appealable judgment and that a petition for a writ of mandamus would be inappropriate. *See, e.g.*, Esensoy v. Board of Pardons & Paroles, 793 So.2d 744 (Ala. 2000); State v. Cobb, 264 So.2d 523, 525 (1972) ("It is established that mandamus will not be granted where petitioner has adequate remedy by appeal"). On the other hand, other cases have noted these aspects in *Moore* and still found that more is required for the surety to salvage the bond. *See, e.g.*, State v. Benedict, 15 N.W.2d 248, 251 (1944).

[228] *See, e.g.*, People v. Cont'l Cas. Co., 134 N.Y.S.2d 742 (1954) ("surety must also demonstrate that it made an unsuccessful effort to secure the person of the principal from the military authorities"); Cumbie v. State, 367 S.W.2d 693 (Tex. Civ. App. 1963).

In cases in which the principal was discharged four months before default and forfeiture[229] or where the principal was not inducted until almost six months after he was required to appear,[230] the surety will have little hope for relief. As one court held, "[the surety is] provided a legal defense . . . while the principal was in the military service of the United States."[231]

3-8. Stay or Vacation of Execution of Judgments, Attachments

Section 524 is another "stay" section of the Act:

50 U.S.C. app. § 524

> (a) Court action upon material effect determination. If a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order, the court may on its own motion and shall on application by the servicemember----
>
> > (1) stay the execution of any judgment or order entered against the servicemember; and
> >
> > (2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.
>
> (b) Applicability. This section applies to an action or proceeding commenced in a court against a servicemember before or during the period of the servicemember's military service or within 90 days after such service terminates.[232]

a. General. Section 524 differs from other stay provisions because it is not a stay of proceedings, but authorizes a court to stay execution of a judgment or order entered against a servicemember. It also authorizes a court to vacate or stay an attachment or garnishment on a servicemember's property. The same basic rules for granting stays under section 522 apply to section 524. Servicemembers must act in good faith. Their military service must materially affect their ability to comply with the judgment or decree entered against them. The suit giving rise to the judgment may have commenced prior to, during, or within 90 days after military service.

There have been only a few reported decisions addressing the statute's predecessor. Those that have, discuss the matter along lines very similar to ordinary stays. For example, the courts are

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[229] United States v. Carolina Cas. Ins. Co., 237 F.2d 451 (7th Cir. 1956).

[230] State v. Benedict, 15 N.W.2d 248 (1944).

[231] *Carolina Cas. Ins. Co.*, 237 F.2d at 453.

[232] 50 U.S.C.S. app. § 524 (LEXIS 2006).

vested with a degree of discretion in deciding what constitutes material effect[233] and a mere showing that the person is in or is now in the military service is not sufficient.[234]

b. Department of Defense Directive 1344.9.

This section does not apply to actions to involuntarily allot military pay to civil creditors pursuant to Department of Defense Directive 1344.9,[235] and Department of Defense Instruction 1344.12.[236] These involuntary allotments are not court-ordered executions or garnishments, and thus this section will not stay enforcement of such an involuntary allotment for non-marital debts.

3-9. Tolling of the Statue of Limitations

50 U.S.C. app. § 526

Another significant procedural protection is the provision tolling the running of the statute of limitations:

> (a) Tolling of statutes of limitation during military service. The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.
>
> (b) Redemption of real property. A period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment.
>
> (c) Inapplicability to internal revenue laws. This section does not apply to any period of limitation prescribed by or under the internal revenue laws of the United States.[237]

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[233] *See, e.g.*, Halstead v. Halstead, 165 P.2d 513 (1946); McKinney v. McKinney, 50 N.Y.S.2d 8 (N.Y. Sup. Ct. 1944).

[234] *See, e.g.*, Pope v. United States Fid. & Guar. Co., 20 S.E.2d 618 (1942).

[235] U.S. DEP'T OF DEFENSE, DIR. 1344.9, INDEBTEDNESS OF MILITARY PERSONNEL (27 Oct 1994) [Hereinafter DOD DIR. 1344.9].

[236] U.S. DEP'T OF DEFENSE, INSTR. 1344.12, INDEBTEDNESS PROCESSING PROCEDURES FOR MILITARY PERSONNEL (18 Nov. 1994) [hereinafter DOD INSTR. 1344.12].

[237] 50 U.S.C.S. app. § 526.

This section of the Act tolls statutes of limitation during the period of military service of any military plaintiff or defendant and "once [military service] . . . is shown, the period of limitations is automatically tolled for the duration of the service."[238] The courts have held that this section is applicable to state[239] and municipal governments.[240] It applies in probate,[241] bankruptcy[242] and administrative proceedings[243] to include actions before the boards of correction of military records[244] and matters before the Merit Systems Protection Board.[245] Whether the cause of action accrued prior to or during the period of service is immaterial.[246] This section is inapplicable, however, to periods of limitations imposed by federal internal revenue laws.[247]

Unlike other general relief provisions, section 526 does not require that servicemembers show their military service materially affected their ability to participate in the proceedings. Although there had been some confusion over this point in the past, the Supreme Court said, in a

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[238] Ricard v. Birch, 529 F.2d 214, 2117 (4th Cir. 1975). *But see*, *In re* Sarah C. v. Paul D., 11 Cal. Rptr.2d 414 (1992) (court seems to add an additional, and questionable, requirement that the servicemember seek a stay rather than seek relief simply under the tolling provision). *See also In re* Melicia L. v. Raymond L., 254 Cal. Rptr. 541 (1988).

[239] Parker v. State, 57 N.Y.S.2d 242 (Ct. Cl. 1945).

[240] Calderon v. City of New York, 55 N.Y.S.2d 674 (Sup. Ct. 1945).

[241] State *ex rel*. Estate of Perry v. Roper, 168 S.W.3d 577 (Mo. Ct. App. 2005).

[242] Baxter v. Watson (*In re* Watson), 292 B.R. 441, (Bankr. S.D. Ga. 2003; A.H. Robins Co., Inc. v. Dalkon Shield Claimants Trust, 996 F.2d 716 (4th Cir. 1993).

[243] Shell Oil Co. v. Indus. Comm'n, 94 N.E.2d 888 (1950).

[244] Detweiler v. Pena, 38 F 3d 591 (D.C.Cir., 1994). *Accord* Hanes v. United States, 44 Fed. Cl. 441 (1999); Kosnik v. Peters, 31 F. Supp.2d 151 (D. D.C. 1998); Ortiz v. Sec'y of Defense, 41 F.3d 738 (D.C. Cir. 1994); There is, however, some lingering "debate" about the applicability of the SCRA's tolling provision to the boards of correction statute of limitations. Randall v. United States, 95 F.3d 339, 341 n.3 (4th Cir. 1996). *See also* Mouradian v. John Hancock Cos., 930 F.2d 972 (1st Cir. 1991), *cert. denied*, 503 U.S. 951 (1992) (more specific military tolling provision in National Labor Relations Act requiring showing of material effect held applicable instead of former SSCRA tolling provision).

[245] Davis v. Dep't of the Air Force, 51 M.S.P.R 246 (1991).

[246] Oberlin v. United States, 727 F.Supp. 946 (E.D. Penn. 1989); *In re* Thompson v. Reedman, 201 F. Supp. 837 (E.D. Pa. 1961); Wolf's Estate, 264 F.2d 82 (3rd Cir. 1959).

[247] 50 U.S.C. app. § 526(c) (LEXIS 2006). *See also* Stone v. C.I.R., 73 T.C. 617 (1980). Even those revenue laws benefiting taxpayers, such as those allowing for claims for overpayments, are not tolled. *See, e.g.*, Allen v. United States, 439 F. Supp. 463 (D.C. Cal. 1977).

case involving a career servicemember, that "[t]he statutory command . . . is unambiguous, unequivocal, and unlimited."[248] In other words, the servicemember need make no showing that the military service has materially affected his or her ability to bring a cause of action and the protection is available to career servicemembers.[249]

Notwithstanding the Supreme Court's statements on this point, there is the possibility that the other party will succeed on a claim of laches.[250] In these cases, the court "must have indications of both elements of laches – inexcusable delay in filing suit and prejudice resulting to defendant."[251]

Section 526 can, of course, be a two-edged sword. It can operate both to the advantage and to the disadvantage of a servicemember because it applies to actions by or against the

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[248] Conroy v. Aniskoff, 507 U.S. 511, 514 (1993). The issue in the case revolved around a career servicemember who failed to pay taxes on real estate and who then failed to seek the property's redemption. *Id*. at 513. Although holding that the former SSCRA's tolling provision worked to the servicemember's advantage, the Court did remark that "we are confident that Congress would have corrected the injustice – or will do so in the future." *Id*. at 518. Thus, it is interesting to compare the older provision with the modern, SCRA, version. Under the prior legislation, the statute stated that "nor shall any part of such [military service] period which occurs after 6 October 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment." 50 U.S.C. app. § 525 (2000). Congress obviously felt it was being anything but unfair as the new provision explains that "[a] period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment." 50 U.S.C.S. app. § 526(b) (LEXIS 2006). The general tolling provisions have also changed very little. *Compare id*. app. § 526(a), *with* 50 U.S.C. app. § 525 (2000).

[249] In *Conroy*, the Supreme Court not only overruled the Maine Supreme Court, but indicated its specifically its disapproval of certain decisions which had felt there was a need for career servicemembers to show material effect. *See Conroy*, 511 U.S. at 514 n.4 (citing Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977)); Bailey v. Barranca, 488 P.2d 725 (1971); King v. Zagorski, 207 So.2d 61 (Fla. App. 1968).

[250] Detweiler v. Pena, 38 F 3d 591 (D.C.Cir., 1994). *See also* Neptune v. United States, 38 Fed. Cl. 510 (1997).

[251] Deering v. United States, 620 F.2d 242, 245 (1980) (despite tolling, laches proved). *See also* Cornetta v. United States, 851 F.2d 1372 (Fed. Cir. 1988) (laches not proved); (Foster v. United States, 733 F.2d 88 (Fed. Cir. 1984) (laches proved). Many cases dealing with laches and the former tolling provisions revolve around military pay claims and the like, but the doctrine of laches has been applied notwithstanding the tolling provision in the context of purely civilian controversies. *See, e.g.*, Landis v. Hodgson, 706 P.2d 1363 (Ida. App. 1985).

servicemember.[252] It is not applicable to suits involving family members and their claims.[253] While the statute's "heirs, executors, administrators, or assigns"[254] language may be of utility to a servicemember's estate, it does not work to extend the protection to family members.[255]

Courts may also decide that the time period in question is not actually a statute of limitation.[256] In addition, the provision only applies to the time period before bringing a suit. It does not extend time periods within a suit, such as time periods to avoid motions to dismiss for failure to prosecute an action.[257] It is inapplicable if the servicemember has no interest in the suit or proceeding.[258] This provision also applies to Reserve Component active military duty service, but not weekend drill or individual unit training[259] and it is, of course, inapplicable to the National Guard when not in federal service.[260] Although a statute of limitations is tolled during periods of active duty, it has been noted that the SSCRA, like the current SCRA, defines "military service" a bit more broadly. It can also encompass "any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful

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[252] *See* Ricard v. Birch, 529 F.2d 214, 216 (4th Cir. 1975) ("the parallel purpose of the Act [is] to protect the rights of individuals having causes of action against members of the armed forces"). *See also* Hamner v. BMY Combat Sys. 869 F. Supp. 888 (D. Kan., 1994), *aff'd*, 79 F.3d 1156 (10th Cir. 1996) (suit dismissed where injured servicemember files suit 2 years and one day after release from active duty, one day after running of two year statute of limitations).

[253] Ray v. Porter, 464 F.2d 452 (6th Cir. 1972) (statute of limitations tolled as to defendant servicemember, but not as to defendant non-servicemember spouse; cause of action properly maintained against former and properly dismissed as to latter). *Accord* Card v. American Brands Corp., 401 F. Supp. 1186 (D.C.N.Y. 1975) (non-servicemember's loss of consortium barred); Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D.C. Vt. 1974) (loss of consortium claim barred even though derivative to servicemember's claims).

[254] 50 U.S.C. app. § 526(a) (LEXIS 2006).

[255] Miller v. United States, 803 F.Supp. 1120 (E. D. Va. 1992).

[256] *See, e.g., In re* a Child Whose First Name is Baby Girl, 615 N.Y.S. 2d 800, 801 (N.Y. App. Div. 1994) ("father failed to do all that he could to establish a parental relationship within the six months immediately preceding the child's placement for adoption").

[257] Dellape v. Murray, 651 A. 2d 638 (Pa. Commw. Ct. 1994).

[258] *See, e.g.*, Wells v. Brown, 9 Vet. App. 293 (1996); Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) (no tolling where United States was substituted for servicemember as party to the suit).

[259] Min v. Avila, 991 S.W.2d 495 (Tex. App. 1999).

[260] Bowen v. United States, 49 Fed. Cl. 673, 676 (2001), *aff'd*, 292 F.3d 1383 (Fed. Cir. 2002)

cause."[261] Thus, a person who was no longer performing ordinary duties but who "was . . . on the 'temporary disability retired list'" would be covered.[262]

3-10. Revocation of Interlocutory Orders

A final procedural rule is found in section 583. In straightforward fashion, it provides that "[a]n interlocutory order issued by a court under this Act may be revoked, modified, or extended by that court upon its own motion or otherwise, upon notification to affected parties as required by the court." [263]

This section permits a court that has issued an interlocutory order under the Act to revoke, modify, or extend such an order on its own motion or otherwise. This section has relevance when read together with other sections that allow a court to grant certain relief and then allow the court to do things such as "in the interest of all parties." For example, section 531, which deals with eviction and distress, allows a court to grant a 90-day stay of eviction proceedings "unless in the opinion of the court, justice and equity require a longer or shorter period of time."[264] Thus, the court could issue whatever interlocutory orders its rules of procedure allowed in such a proceeding if it found that such an order would be equitable for all the parties involved.

3-11. Garnishment of Pay

Section 5220a, title 5, United States Code,[265] outlines how a judgment creditor may garnish pay from a federal employee. In the case of servicemembers, although their pay is subject to garnishment, it is possible for them to interpose two defenses. First, the creditor must "be in compliance with the procedural requirements of the Servicemembers Civil Relief Act."[266] Second, the servicemember may be able to show that there was an "absence . . . from an appearance in a judicial proceeding resulting from the exigencies of military duty.[267]

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[261] 50 U.S.C.S. app. § 511(2)(C) (LEXIS 2006).

[262] Mason v. Texaco, 862 F.2d 242, 244 (10th Cir. 1988).

[263] 50 U.S.C. app. § 583.

[264] *Id.* § 531(b)(1)(A).

[265] 5 U.S.C.S. § 5220a (LEXIS 2006).

[266] *Id.* § 5220a(k)(2)(A).

[267] *Id.* § 5220a(k)(2)(B).

The Department of Defense (DoD) implements this statute through *DoD Directive. 1344.9*[268] and *DoD Instruction 1344.12*.[269] In fact, the DoD outlines the requirements for processing "debt complaints"[270] as well as requests to establish an involuntary allotment.[271] In accordance with the statutory mandate, the DoD will not authorize an involuntary allotment if there is a lack of compliance with the SCRA.[272] As to what these procedural requirements are, neither the statute nor the implementing instruction are clear. One can surmise, however, that the most likely procedures a creditor must comply with are those related to default judgments.[273] A creditor, that is, must comply with the default rules in order to obtain an involuntary allotment against a servicemember.[274]

An involuntary allotment will not be established if military exigencies have hindered the defendant-servicemember. "Exigencies of military duty" are defined as follows:

> A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the Military Services from appearance at a judicial proceeding or prevents the member from being able to respond to a notice of application for an involuntary allotment. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.[275]

3-12. Practical Considerations

Servicemembers and their attorneys should be aware of several additional practical consequences in addition to the consequences and technical application discussed thus far. Foremost among these is consideration about whether s/he should take advantage of the Act. There may be times when defending, rather than staying, may be a better option. While the statute of limitations may be tolled, there are times when the servicemember will be better off to bring the suit as soon as possible and avoid the risk that it will be defeated on a claim of laches.

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[268] DOD DIR. 1344.9, *supra* note 235.

[269] DOD INSTR. 1344.12, *supra* note 236.

[270] *Id*. para. 6.1.

[271] *Id*. para. 6.2.

[272] *Id*. para. 6.2.2.5.3.1.

[273] *See* Major Howard McGillan, *Defenses to Involuntary Allotments for Creditor Judgments—Implementing the Hatch Act Reform Amendments*, ARMY LAW., Jan. 1995, at 68.

[274] *See supra* paras. 3-2 and 3-4

[275] DOD DIR. 1344.9, *supra* note 235, para. E2.1.4.

Next, state law should be consulted for at least three reasons. First, as a very basic matter, there is a need to make sure that other procedural aspects of the litigation have been met. For example, has there been effective service? Next, many states have adopted legislation that is similar, if not the same as, the SCRA. Although a seemingly needless redundancy, this was often done as a way to insure that Guardsmen, left unprotected by the SSCRA and SCRA, were given some form of relief. Regardless, these state protections may also protect other reserve and active component members. In any event, despite the SCRA's long history and despite its place as a cornerstone of veterans' legislation, there are times when a court will be more easily persuaded when it is shown that the action is valid as a matter of state law. Finally, there are times when the state SCRA-like provisions will actually extend protections.[276]

[276] *See, e.g.*, *In re* Marriage of Thompson, 832 P.2d 349 (1992) (although defendant fell outside of SSCRA default protections, application of state provision led to relief from judgment); Bernhardt v. Alden Café, 864 A.2d 421, 422 (2005) ("We hold that default should have been set vacated under the New Jersey Soldiers' and Sailors' Civil Relief Act"). Jusino v. New York City Hous. Auth., 691 N.Y.S.2d 12, 17 (N.Y. App. Div. 1999) (New York stay provisions held to cover "an infant who is in the care of a parent whose military duty causes the infant to be unable to 'represent his interest'").